Andrew Gerber (AG 0779) Penelope Fisher-Birch (PFB 8019)

KUSHNIRSKY GERBER PLLC 27 Union Square West, Suite 301 New York, NY 10003 (212) 882-1320 Attorneys for Plaintiffs David Momyer and Justin Davis

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

DAVID MOMYER and :

JUSTIN DAVIS, : Case No.

Plaintiffs, : **COMPLAINT**

BROMPTON BICYCLE, INC., NYCEWHEELS, LLC, and DOES 1 – 10,

v.

: JURY TRIAL DEMANDED

Defendants.

Plaintiffs David Momyer and Justin Davis (collectively, "Plaintiffs"), by their attorneys Kushnirsky Gerber PLLC, for their complaint against defendants Brompton Bicycle, Inc. ("Brompton"), NYCeWheels, LLC ("NYCeWheels"), and Does 1-10 (collectively, "Defendants") allege as follows:

NATURE OF THE ACTION

- 1. This is an action for copyright infringement brought by independent artists against a multinational corporation and its authorized retailers that used the artists' original works in advertising without permission or authorization.
- 2. Plaintiffs are well-known, independent street artists who are frequently commissioned to paint murals around the world. Both Plaintiffs also have established studio

practices and regularly exhibit their work in galleries. Plaintiffs support themselves primarily through the commission and licensing of their creative works.

- 3. Mr. Momyer, known professionally as MOMO, is one of the most prominent large-scale muralists in the world. Mr. Momyer's works frequently feature contrasting bright colors and intersecting shapes.
 - 4. One of Mr. Momyer's murals, *Mural on York Street*, is shown below.



- 5. Mr. Momyer obtained federal copyright registration number VA0002105272 for *Mural on York Street* on June 5, 2018.
- 6. Mr. Davis, known professionally as JMikal Davis—and formerly by the pseudonym Hellbent—is best known for creating murals that weave together vibrant swaths of contrasting colors and patterns.
 - 7. One of Mr. Davis's murals, *Not That Way*, is shown below.



- 8. Mr. Davis, via his company Hellbent Art Studios, LLC, obtained federal copyright registration number VA0002105372 for *Not That Way* on June 5, 2018. Hellbent Art Studios, LLC subsequently assigned the copyright in *Not That Way* to Mr. Davis.
- 9. Brompton is one of the most recognizable bicycle brands in the world and sells bicycles and bicycle accessories directly to consumers as well as through over 1,400 authorized resellers. It is the leading folding bicycle company in the United States.
- 10. Brompton does not advertise its products via traditional media. Instead, Brompton employs a calculated multi-channel social media advertising strategy, using Instagram, Facebook, and Twitter to generate "digital word of mouth" and "engage with its international customers, using competitions, campaigns and events across multiple networks to promote its brand." Such

¹ See Rebecca Sentence, "<u>How Brompton Bicycle uses social media to spread the word about its brand</u>," (May 20, 2016), https://www.clickz.com/how-brompton-bicycle-uses-social-media-to-spread-the-word-about-its-brand/100505/.

coordinated social media marketing is fast becoming one of the most popular and successful means

of product promotion today.

11. Brompton also organizes "an array of its own events that it runs across the world,"

which are "always promoted enthusiastically on its social media channels with pictures and videos,

and copious retweets or reposts of anyone who is taking part." These events are designed to

"encourage[] people new to the brand to try out a Brompton for the first time – which might just

result in them coming back to hire again later or purchase their own bike further down the line."³

12. Examples of social media marketing campaigns that Brompton has organized to

promote its bicycles and bicycle accessories in the United States and throughout the world include

and have been promoted under the hashtags #TryBrompton, #MyBrompton, #MadeForCities, and

#OpenRoad.

13. In connection with these campaigns and its concerted expansion into the United

States market, Brompton sponsored dozens of events at authorized Brompton retailers throughout

the United States, all of which were aimed at expanding brand awareness and generating new

customers and sales.

14. Without obtaining any permission or authorization from Plaintiffs, Brompton used

photographs of bicycles and models posed in front of Not That Way and Mural on York Street

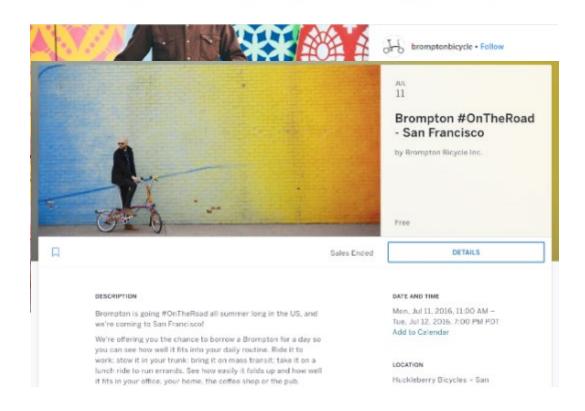
(collectively, the "Infringing Advertisements") to advertise these events and campaigns. Examples

of the Infringing Advertisements are shown below.

² See id.

³ See id.





- 15. Brompton also distributed the Infringing Advertisements to NYCeWheels and other bicycle retailers for use in advertising sales of Brompton bicycles and accessories and NYCeWheels and other bicycle retailers distributed and used the Infringing Advertisements for such purposes.
- 16. Plaintiffs assert claims for copyright infringement under the United States Copyright Act, 17 U.S.C. § 101, et seq. (the "Copyright Act"). They seek monetary damages and injunctive relief.

PARTIES, JURISDICTION, AND VENUE

- 17. This is an action for copyright infringement under the Copyright Act. The Court has subject matter jurisdiction pursuant to 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.
- 18. The Court has personal jurisdiction over Brompton and NYCeWheels pursuant to N.Y. C.P.L.R. §§ 301 and 302.
- 19. Defendant Brompton is a corporation organized under the laws of Delaware with a flagship store location at 287 Bleecker Street in New York, New York. Brompton does systematic business in New York and in this District; and has transacted business in New York and contracted to supply goods or services in New York in connection with the matters giving rise to this lawsuit.
- 20. Defendant NYCeWheels is a limited liability company organized under the laws of New York with a principal place of business at 353 East 58th Street, New York, New York 10022. NYCeWheels does systematic business in New York and in this District; has transacted business in and contracted to supply goods or services in New York in connection with the matters giving rise to this lawsuit.
- 21. Defendants Does 1-10 are entities whose identities are unknown to Plaintiffs at this time. In connection with the named Defendants and their activities described herein, Does 1-10

have used the Infringing Advertisements to advertise the sale of Brompton bicycles and accessories. Plaintiffs believe that information obtained in discovery will lead to the identification of the true identities and locations of Does 1-10 and permit Plaintiffs to amend this Complaint to state the same.

- 22. Plaintiff David Momyer is an individual residing in New Orleans, Louisiana. Mr. Momyer owns the copyright in *Mural on York Street*.
- 23. Plaintiff Justin Davis is an individual residing in Queens, New York. Mr. Davis owns the copyright in *Not That Way*.
- 24. Plaintiffs have satisfied the requirements of 17 U.S.C. § 411(a) prior to filing this Complaint. Copies of the copyright registration certificates for *Not That Way* and *Mural on York Street* (collectively, the "Murals") are attached as Exhibit A.
- 25. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400 because Defendants do business, may be found, and are subject to personal jurisdiction here; and because a substantial part of the events or omissions giving rise to the claims occurred here.

FACTUAL BACKGROUND

I. Plaintiffs' Original Murals

- 26. In 2013, Mr. Momyer was commissioned by the DUMBO District Management Association to create *Mural on York Street* in the DUMBO neighborhood of Brooklyn, New York. Mr. Momyer completed the mural in August 2013. *Mural on York Street*, which occupies a large wall beneath the Brooklyn Queens Expressway, is one of the most prominent and recognizable murals in Brooklyn and is featured in many guides to New York street art.
- 27. In 2016, Mr. Davis, was commissioned by a construction company to create *Not That Way* in San Francisco, California. Mr. Davis completed the mural in September 2016.

28. Mr. Momyer and Mr. Davis each retained ownership of the copyright in these works.

II. Defendants' Willful Infringement of the Murals

- 29. Brompton promotes its brand and advertises its products primarily through a multichannel social media marketing strategy designed to generate "digital word of mouth" and "engage with its international customers, using competitions, campaigns and events across multiple networks to promote its brand."
- 30. Key to Brompton's marketing strategy are its sponsored events, which are "always promoted enthusiastically on its social media channels with pictures and videos, and copious retweets or reposts of anyone who is taking part." These events are designed to "encourage[] people new to the brand to try out a Brompton for the first time which might just result in them coming back to hire again later or purchase their own bike further down the line."
- 31. To promote brand awareness and sales of its products, Brompton has organized numerous social media campaigns in the United States and throughout the world, including and have been promoted under the hashtags #TryBrompton, #MyBrompton, #MadeForCities, and #OpenRoad. For example, the #TryBrompton campaign, which Brompton has organized in dozens of cities, allows prospective customers to try out Brompton bicycles for free before buying.
- 32. In connection with these campaigns and its concerted expansion into the United States market, Brompton has sponsored dozens of events at authorized Brompton retailers throughout the United States, all of which were aimed at expanding brand awareness and generating new customers and sales.
- 33. Without obtaining any permission or authorization from Plaintiffs, Brompton used and continues to use the Murals in its social media marketing campaigns and in advertising for its

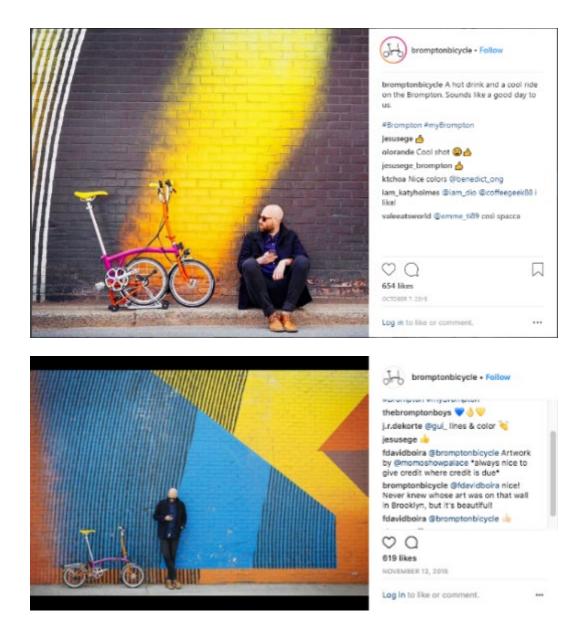
sponsored events. Brompton has also distributed photographs of the Murals to retailers for their use in advertising Brompton bicycles and accessories.

34. Despite having clear, affirmative knowledge of Plaintiffs' authorship of the Murals, Brompton has refused to cease its infringing conduct and has continued to display the Murals in its advertising without the permission or authorization of Plaintiffs.

A. Mural on York Street

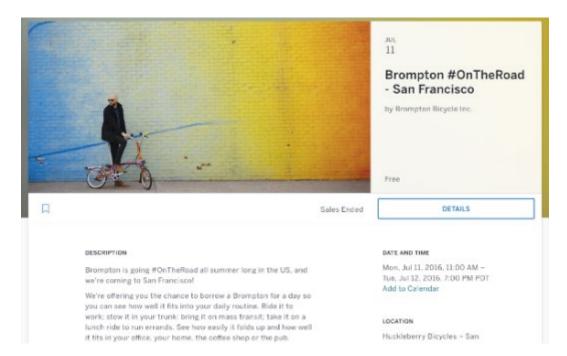
35. Starting in at least August 2015, Brompton began using *Mural on York Street* in its "#MyBrompton" campaign, as shown below. Additional examples of the Infringing Advertisements are included in <u>Exhibit B</u>.





- 36. In an Instagram post on November 12, 2015, shown above, a commenter identified Mr. Momyer as the author of the work, writing "@bromptonbicycle Artwork by @momoshowpalace *always nice to give credit where credit is due*." In response, Brompton wrote, "nice! Never knew whose art was on that wall in Brooklyn, but it's beautiful!"
- 37. Despite knowing since at least November 2015 that Mr. Momyer was the creator of *Mural on York Street*, Brompton never contacted Mr. Momyer to inquire about permission to

use his work in its advertising. Indeed, Brompton continued to use *Mural on York Street* in its advertising for its "#OnTheRoad" campaign in 2016, as shown below.



38. Brompton also distributed photographs of *Mural on York Street* to its authorized retailers throughout the United States, including Does 1-10, to use for their own promotional events and to advertise the sale of Brompton bicycles and accessories, as show below.

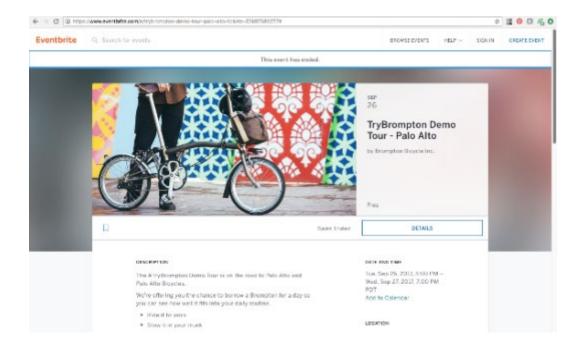


B. Not That Way

39. Starting in at least March 2017, Brompton used *Not That Way* in social media advertisements for its roll top bags, as shown below.



40. In addition, Brompton used *Not That Way* to promote at least five sponsored events across the United States as part of its "#TryBrompton" campaign, as shown below. Additional examples of Infringing Advertisements are included in Exhibit B.



- 41. Brompton also distributed photographs of *Not that Way* to its authorized retailers throughout the United States, including NYCeWheels and Does 1-10, to use for their own promotional events and to advertise the sale of Brompton bicycles and accessories.
- 42. NYCeWheels has used at least one Infringing Advertisement in a sponsored post on Facebook.com, as shown below.



43. Plaintiffs have been significantly damaged by these unlawful uses of the Murals, and have been forced to file this Action in order to protect their rights and livelihood.

CLAIM FOR RELIEF COPYRIGHT INFRINGEMENT - 17 U.S.C. § 501, et seg.

- 44. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 43 above, and incorporate them herein by this reference.
- 45. Plaintiffs are the respective legal owners of all right, title, and interest in the Murals, including the copyrights in those works.

- 46. Defendants have copied, reproduced, distributed, adapted, and/or publicly displayed elements of the Murals without the consent, permission, or authority of Plaintiffs.
- 47. Defendants' conduct constitutes infringement of Plaintiffs' copyrights and exclusive rights in violation of sections 106 and 501 of the Copyright Act.
- 48. Defendants' acts of infringement have been willful, intentional, purposeful, and in reckless disregard of and with indifference to the rights of Plaintiffs.
- 49. As a result of the infringements that began in and stemmed from the United States, Plaintiffs have and will continue to suffer damages in the United States and around the world.
- 50. As a result of the infringements that began in and stemmed from the United States, Defendants have unlawfully profited in the United States and around the world.
- 51. Plaintiffs are entitled to their actual damages and Defendants' profits related to the infringements both in the United States and around the world, pursuant to 17 U.S.C. § 504.

WHEREFORE, Plaintiffs demand judgment as follows:

- 1. Awarding Plaintiffs their actual damages in connection with Defendants' willful copyright infringement;
- 2. Awarding Plaintiffs all of Defendants' disgorged worldwide profits resulting from the Infringing Advertisements;
- 3. Awarding Plaintiffs interest, including prejudgment interest, on the foregoing sums;
- 4. Granting an injunction that permanently restrains and enjoins Defendants from copying, reproducing, distributing, adapting, and/or publicly displaying the Infringing Advertisements or any unlawful copy of the Murals; and

5. Awarding Plaintiffs such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury in this action of all issues so triable.

Dated: New York, New York

April 1, 2019

Respectfully Submitted,

KUSHNIRSKY GERBER PLLC

By: _______Andrew Gerber (AG 0779)

Penelope Fisher-Birch (PFB 8019)

andrew@kgfirm.com penelope@kgfirm.com

27 Union Square West, Suite 301

New York, NY 10003

(212) 882-1320

Counsel for Plaintiffs David Momyer and

Justin Davis

Exhibit A

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Acting United States Register of Copyrights and Director

Registration Number VA 2-105-272

Effective Date of Registration: June 05, 2018

Title Title of Work: Mural on York Street Completion/Publication Year of Completion: 2013 Date of 1st Publication: August 05, 2013 Nation of 1st Publication: United States Author

> Author: David Momyer Pseudonym: MOMO **Author Created:** 2-D artwork Work made for hire: No Domiciled in: United States

Copyright Claimant

Copyright Claimant: David Momyer

1000 Bourbon Street, 380b, New Orleans, LA, 70116, United States

Rights and Permissions

Address:

Organization Name: Kushnirsky Gerber PLLC 27 Union Square West

Suite 301

New York, NY 10003 United States

Certification

Name: Ilya Kushnirsky Date: June 05, 2018

Page 1 of 2

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Acting United States Register of Copyrights and Director

Registration Number

VA 2-105-372

Effective Date of Registration:

June 05, 2018

Title Title of Work: Not That Way Completion/Publication Year of Completion: 2016 September 22, 2016

Date of 1st Publication: Nation of 1st Publication: United States

Author

Author: Hellbent Art Studios LLC

Author Created: 2-D artwork Work made for hire: Yes Domiciled in: **United States**

Copyright Claimant

Copyright Claimant: Hellbent Art Sudios LLC

8410 101st Street, Apt CC, Richmond Hill, NY, 11418, United States

Rights and Permissions

Organization Name: Kushnirsky Gerber PLLC

27 Union Square West Address:

Suite 301

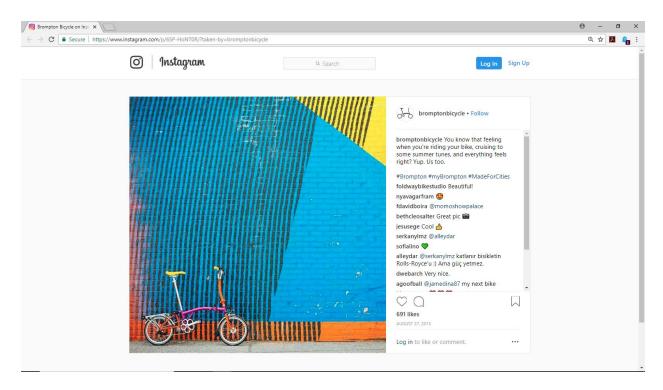
New York, NY 10003 United States

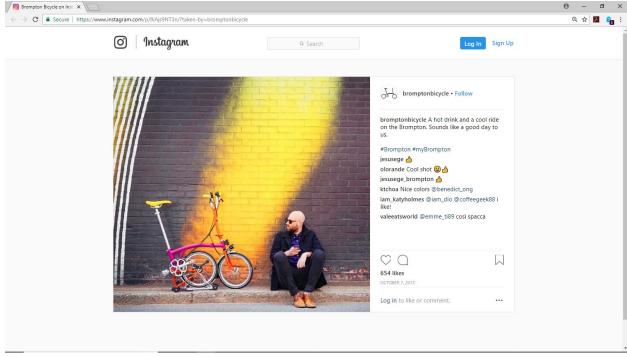
Certification

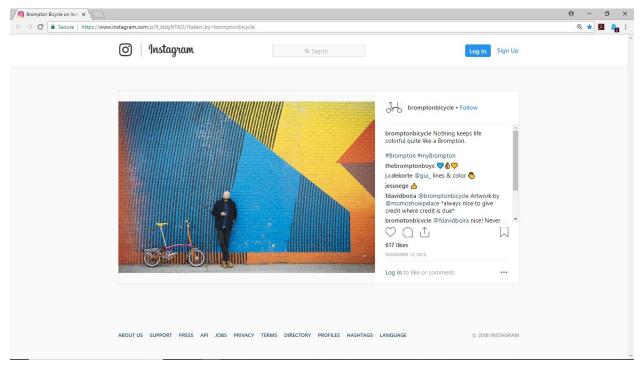
Name: Ilya Kushnirsky Date: June 05, 2018

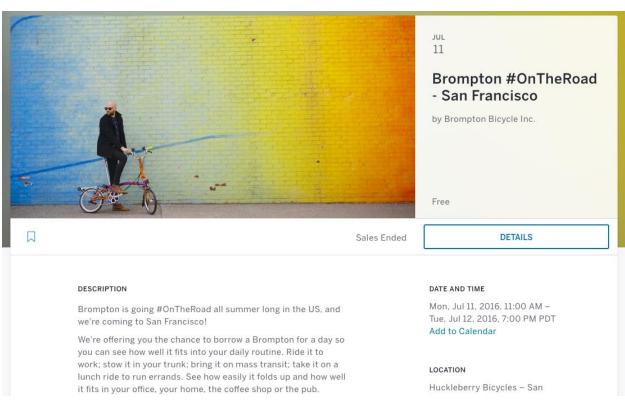
Page 1 of 2

Exhibit B



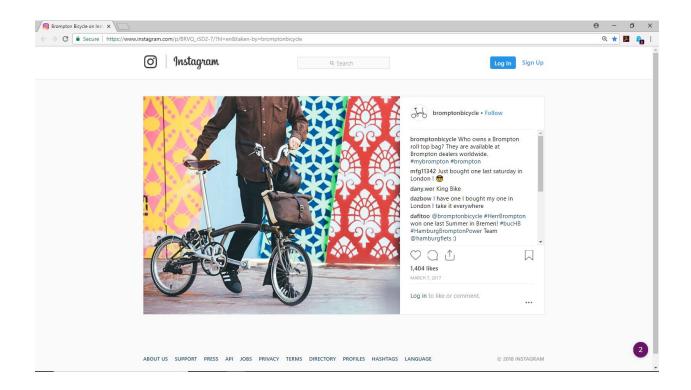








Case 1:19-cv-02875-AT Document 1 Filed 04/01/19 Page 24 of 34





Monday is our first #TryBrompton demo event in Seattle at Electric and Folding Bikes Northwest. Still a couple of spots left to take a bike home overnight!

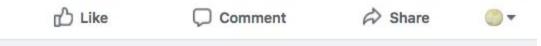


#TryBrompton in Seattle, WA

The #TryBrompton 2017 US Demo Tour is on the road to Seattle, WA and Electric & Folding Bikes NW. We're offering you the chance to borrow a Brompton for a day so you can see how well it fits into your life. Ride it to work Stow it in your trunk ...

BROMPTON.COM

159



Top Comments 1



Want to #TryBrompton in San Francisco? Sign up to take a bike home for the day on Monday from Huckleberry Bicycles. Use it to ride to work, run errands, meet friends and see how fun and convenient a Brompton bike is. It's all free, so reserve your bike now!



#TryBrompton in San Francisco

The #TryBrompton 2017 US Demo Tour is on the road to San Francisco and Huckleberry Bicycles. We're offering you the chance to borrow a Brompton for a day so you can see how well it fits into your life. Ride it to work Stow it in your...

BROMPTON.COM





On August 3, we'll be in New Haven at the devil's gear bike shop. Sign up now to #TryBrompton for 24 hours!



#TryBrompton in New Haven

The #TryBrompton 2017 US Demo Tour is on the road to New Haven and The Devil's Gear. We're offering you the chance to borrow a Brompton for a day so you can see how well it fits into your life. Ride it to work Stow it in your trunk Bring it...

BROMPTON.COM

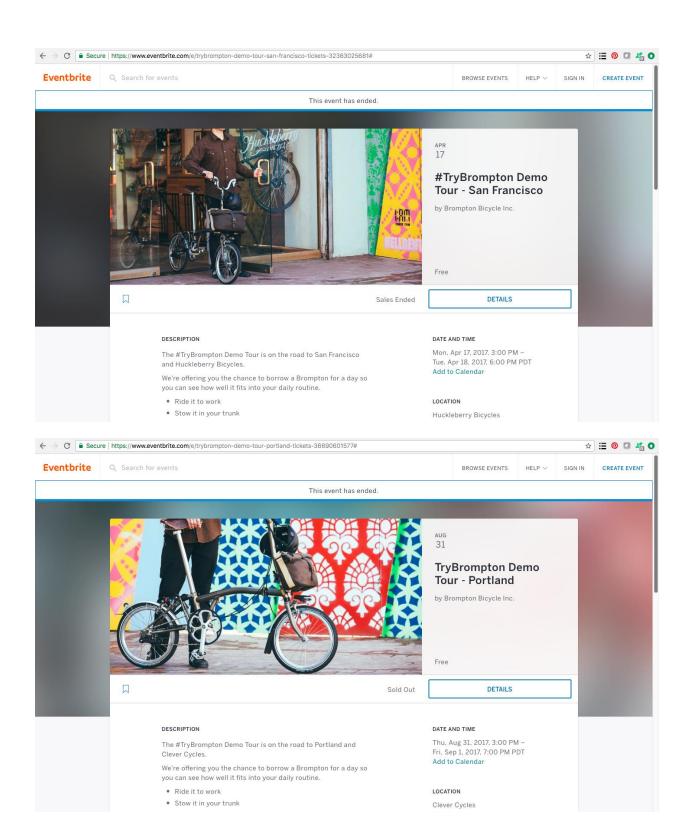


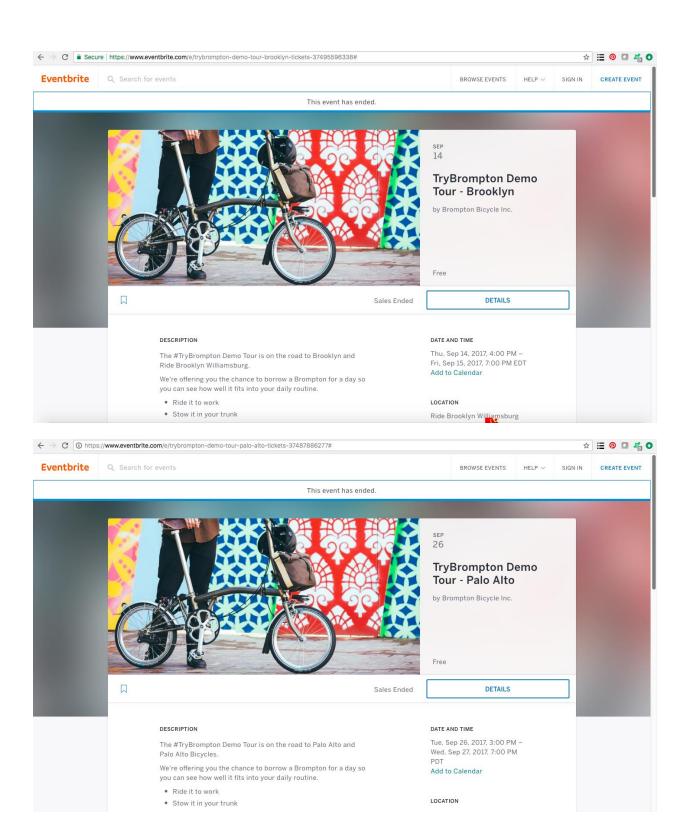
D 136



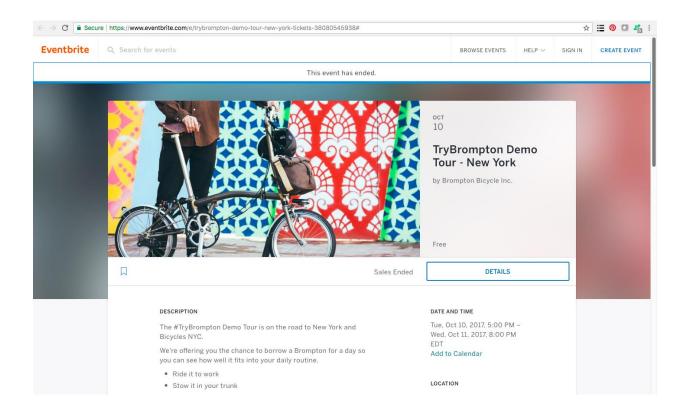
Come #TryBrompton in Philadelphia on August 24 at Firth & Wilson Transport Cycles. Sign up now for a FREE 24 hour bike demo!



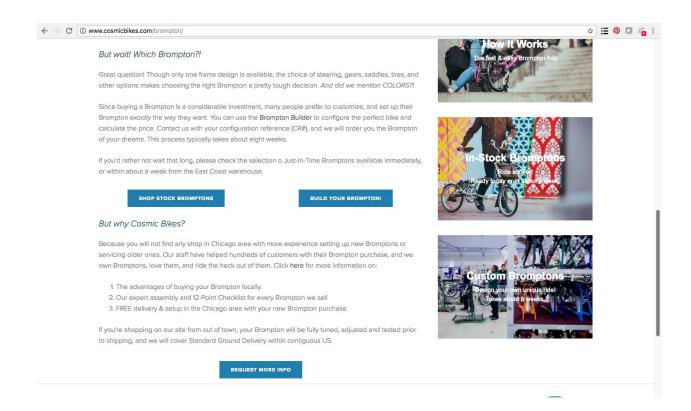




Case 1:19-cv-02875-AT Document 1 Filed 04/01/19 Page 31 of 34



Case 1:19-cv-02875-AT Document 1 Filed 04/01/19 Page 32 of 34





NYCeWheels specializes in electric bikes, folding bikes, electric scooters & kick scooters. Visit us online or in-store at 58th Street between 1st and 2nd Avenue - New York City. Test rides available on all bikes.

